Supreme Court, U. S.
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in the

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1670

AVIS RENT-A-CAR SYSTEMS, INC.,
Appellant,

vs.

CHARLIE VINING and
VELMA VINING, his wife,
Appellees.

On Appeal from the Supreme Court of Florida

MOTION TO DISMISS APPEAL, Or in the Alternative TO AFFIRM JUDGMENT

SHERIDAN K. WEISSENBORN, ESQ.
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Attorneys for Appellees

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in the

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1670

AVIS RENT-A-CAR SYSTEMS, INC.,
Appellant,

vs.

CHARLIE VINING and
VELMA VINING, his wife,
Appellees.

On Appeal from the Supreme Court of Florida

MOTION TO DISMISS APPEAL, Or in the Alternative TO AFFIRM JUDGMENT

Pursuant to Rule 16, paragraphs 1.(b) and 1.(c), of the Revised Rules of this Court, Appellees move that this appeal be dismissed or, alternatively, that the Judgment of the Florida Supreme Court should be affirmed.

JURISDICTION

This is a direct appeal from a final Judgment of the Florida Supreme Court, holding the Florida "Unattended Motor Vehicle Statute" Constitutional pursuant to 28 U.S.C., Sec. 1257(2). The judgment of the Florida Supreme Court was entered on November 21, 1979. (App. A) On January 23, 1980, a timely filed Petition for Rehearing was denied. (App. B) On April 14, 1980, a timely Notice of Appeal to this Court was filed with the Florida Supreme Court. (App. C)

QUESTIONS PRESENTED

1. Whether there is a substantial federal question presented?

2. Whether Sec. 316.097, Fla. Stat. (1971) renumbered 316.1975, Fla. Stat. (1977), the "Unattended Motor Vehicle Statute", is repugnant to Equal Protection of the Laws Clause of the 14th Amendment?

STATUTE INVOLVED

The statute involved, Sec. 316.097, Fla. Stat. (1971), renumbered 316.1975 (1977), is as follows:

> "no person driving or in charge of any motor vehicle, *except a licensed delivery truck* or other *delivery vehicle while making deliveries,* shall permit it to stand unattended without first stopping the engine, locking the ignition, and removing the key. No vehicle shall be permitted to stand unattended upon any perceptible grade without stopping the engine and effectively setting the brake thereon and turning the front wheels to the curb or side of the street." (emphasis added)

STATEMENT

The Appellees sued the Appellant for damages, arising out of an automobile accident involving an automobile, which was owned by the Appellant and stolen from the Appellant's care, custody and control at its rental area in the Miami International Airport. (See *Vining v. Avis,* 354 So.2d 54 (Fla. 1977).)

The Supreme Court of Florida framed the issue, in *Vining v. Avis,* supra, as being, whether the owner of a vehicle, who leaves it unlocked and unattended, while the keys are in the ignition in violation of the "Unattended Motor Vehicle Statute", is liable for the conduct of the thief who steals the vehicle and subsequently injures another through negligent operation. The Court then held that it was a jury question on the issue of whether it was foreseeable for the owner, that a thief would steal the car, and, if so, whether the accident was a proximate cause of the negligence of the owner in leaving the keys in the ignition. The Court, thereafter, remanded the case to the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida, for a jury trial.

Subsequent to the remand by the Florida Supreme Court, the Appellant filed a Motion for Determination Vel Non of the Statute and the Metropolitan Dade

County Ordinance Sec. 30-249, which was exactly the same wording. The basis of the motion was that the Statute exempted delivery vehicles from the requirement of removing the keys from the ignition and this denied the Appellant the Equal Protection of the Laws and Due Process of Law as granted by the Florida and United States Constitutions. (App. D)

At a hearing on the motion, the Trial Court found that the Florida "Unattended Motor Vehicle Statute" and the Metropolitan Dade County Ordinance, were unconstitutional and void as being violative of the 14th Amendment of the United States Constitution in that the Equal Protection of the Laws and Due Process of Law were denied. (App. E) The Trial Court further found that the Statute and Ordinance violated Article I, Sec. 2 of the Florida Constitution and Article I, Sec. 9 of the Florida Constitution providing that no person shall be deprived of life, liberty or property without due process of law. (App. E)

It was the Trial Court's determination that the Statute and Dade County Ordinance arbitrarily and unreasonably exempted licensed delivery vehicles from the restrictions imposed by the Statute when there were no practical differences between delivery vehicles and rental car vehicles, which are likewise part of a commercial enterprise. Thus, the Court determined that rental cars should likewise enjoy the exemption created in the Statute and, therefore, the Statute was unjustly discriminatory, and denied the Respondent the equal protection of the laws. (App. D)

At the hearing on the constitutionality of the Statute, the Trial Court actually determined that it

believed that the Statute was badly framed and that because of that, there was an invalid classification. (App. F)

Thereafter, the Appellees filed a Petition for Writ of Certiorari to the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida. (App. G)

Subsequent to the oral argument on the previously filed Petition in the Florida Supreme Court, the Florida Supreme Court determined that the Florida "Unattended Motor Vehicle Statute", and the Dade County Ordinance were not unconstitutional and reversed the Trial Court.

ARGUMENT

The Appellees believe that there is no substantial doubt as to the constitutional and statutory validity of the Florida "Unattended Motor Vehicle Statute" and the Dade County Ordinance promulgated pursuant thereto. The Appellees also believe that an appeal to this Court does not lie within this Court's jurisdiction pursuant to 28 U.S.C., 1257(2). Hence, we submit that it would be appropriate to dismiss the present appeal on the ground that this case is not within the appellate jurisdiction of this Court.

1. Rule 16(b) of the Revised Rules of this Court provides that the Court will receive a Motion to Dismiss an appeal from a State Court on the ground that it does not present a substantial federal question. The instant cause is obviously such a case.

In 1904, this Court recognized that a federal question could be explicitly foreclosed by a prior decision as to afford no basis for this Court to grant a writ of error to a State Court. *Leonard v. Vicksburg, Shreveport & Pacific Railroad Company,* 198 U.S. 416, 49 L.Ed. 1108 (1904).

If the ruling of this Court is the basis of the State Court's decision, a writ of error does not lie. *Minneapolis St. Paul & Sault Ste. Marie Railroad Company v. Merrick Company,* 254 U.S. 376, 65 L.Ed. 312 (1920). The decision of the Florida Supreme Court relies upon three previously entered decisions of this Court. (App. A) Therefore, we submit that there is no substantial federal question presented to this Court, which this Court must determine.

2. Should the Court conclude, however, that the case is properly here on appeal, the judgment below should be affirmed summarily since the Appellant's contentions do not merit plenary consideration. The Florida "Unattended Motor Vehicle Statute" does not deny equal protection of the laws and is not repugnant to the equal protection of the Laws Clause of the 14th Amendment.

The Florida Supreme Court in making its determination considered the Florida law that a statute is presumed to be constitutional and should never be nullified unless it is found to the contrary beyond a reasonable doubt. That is to say that it had to determine whether the exemption for delivery vehicles was arbitrary and unreasonable and that there were absolutely no facts reasonably conceived which would sustain the constitutionality of the statute. The

exempted classification, within the Florida "Unattended Motor Vehicle Statute", will not offend the constitution because it is not made with mathematical precision, nor because in practice/use, it results in inequality. *Lindsley v. Natural Carbonic Gas Company,* 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1910).

In the instant case, the exempted class is based upon a use. The statute exempts those vehicles *in use* (emphasis added) while making deliveries, from the requirements of turning off the ignition and removing the keys from the vehicle.

The Appellant, on the other hand, allows its vehicles to stand unattended with keys in them when not in use. (App. H) There is absolutely no way that one can conceive these two situations to be similar in use.

In the instant case, the Trial Court had determined that as a basis for its decision, that the delivery trucks and rental vehicles were commercial enterprises and, therefore, the Appellant should, likewise, enjoy a favored legislative exemption. This argument is without merit since it is the use which is exempted and not the vehicle. Delivery vehicles are not entitled to the exemption if they are not making deliveries. They must comply like any other vehicle under the statute if they are not making those deliveries. Hence, the commercial enterprise reliance of the Trial Court is erroneous under the facts of the instant case.

Furthermore, one of the purposes of the statute, in question, is to protect the overall safety on the highways. It is not merely a statute to protect theft.

However, it is the Trial Court's reasoning that the delivery vehicles were subject to theft like any other vehicle and, as such, should not be favored. The Florida Supreme Court, however, realized that there cannot be mathematical precision in classifications and it relied upon this Court's decision that the classification must amount to an invidious discrimination; and that there is no violation of equal protection where legislative discrimination reflects the fact, or legislative belief, that evils in the same field are of different dimensions and proportions, requiring different remedies, or where the discrimination which occurs is a consequence of reformative legislation which takes one step at a time and addresses itself to the phase of the problem which seems most acute to the legislative mind. *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

Delivery vehicles, which are exempted under the statute, while *in use* (emphasis added), are most often left in the streets while deliveries are being made. They block the right-of-ways and they cause traffic backups. To force all delivery vehicles to turn off the engines and remove the keys, when often times the driver merely runs in and out of an establishment to make his delivery, increases not only the time in which that vehicle causes chaos in the streets, but also increases the danger of the vehicle totally being unusable as its battery wears down.

Rental cars, on the other hand, have been left by the drivers so that the rental cars can be serviced and made ready to be re-rented. They are not left for such short periods of time in the roadway where other vehicles are traveling, nor are they left unattended with

the driver in close proximity. They are, in fact, left not only for long periods of time but often due to the procedure of the Appellant, left over night while the keys are in them. (App. G)

There is also one other sound basis for exempting these delivery vehicles, while making deliveries, and that is the maintenance of rapid movement of goods in the interstate commerce system. The goods must be moved rapidly and effectively.

Rental cars left at an airport, like those of the Appellant, are not in a similar situation. Equal protection means that the rights of all persons must rest upon the same rule under *like* circumstances, and a regulation should affect alike all persons similarily situated and conditioned with reference to the subject regulated. *State, ex rel Spencer v. Bryan,* 87 Fla. 56, 99 So. 327 (1924). It is this type of situation that the Florida Supreme Court was looking at. Was there a like circumstance?

In the instant case, the situations are not similar. Furthermore, the statute is not made for the welfare of delivery vehicles, for if this were true, then delivery trucks or vehicles would be exempted at all times, including when the driver had stopped for lunch. This is not the case under the statute. If the delivery vehicles are not in the process of making a delivery, they would not be exempt. The statute requires *while making deliveries* (emphasis). It is, therefore, not the business which is being regulated, it is the manner or use within that business.

There is no irrationality or unreasonable classification in the Florida "Unattended Motor Vehicle Statute". The Statute is not unjustly discriminatory, arbitrary or unreasonable.

When normal economic regulation is challenged solely as violating the Equal Protection Clause of the 14th Amendment, the United States Supreme Court consistently defers to legislative determination as to the desirability of particular statutory discriminations. *City of New Orleans v. Dukes,* 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976). This Court, as does the Florida Supreme Court, presumes the constitutionality of the statutory discriminations and requires that only the classification challenge be rationally related to a legitimate state interest. *City of New Orleans v. Dukes,* supra. Therefore, unless the classification of exempting delivery trucks trammels fundamental personal rights or is drawn upon inherently, suspect distinction such as race, religion or alienage, this Court will not declare the Statute to be unconstitutional. *City of New Orleans v. Dukes,* supra.

Relying upon this Court's prior decisions, the Florida Supreme Court determined that the facts of the instant case did not deprive the Appellant of the equal protection of the laws. The exempted clause is not arbitrary, capricious, nor does it trammel fundamental personal rights, nor is drawn upon inherently suspect distinctions such as race, religion, or alienage, it merely, for the protection and safety of travelers upon the highways and byways, determined that for the safety of the public, the delivery vehicles be exempt under a use classification from removing the keys. It is not the delivery trucks that the youth of this country or the car

thieves of this country steal. It is the vehicles that are left in neighborhoods or areas of high crime that the kids, who wish to joy ride, take because the keys are left in them or the thieves take because the keys are left in them. The mere fact that both rental car companies and delivery vehicles are considered to be commercial enterprises, does not mean that the Florida "Unattended Motor Vehicle Statute" denies the rental car company equal protection of the law.

CONCLUSION

For the foregoing reasons, either this appeal should be dismissed or the judgment of the Florida Supreme Court should be affirmed.

Dated: May 21, 1980.

Respectfully submitted,

SHERIDAN K. WEISSENBORN, ESQ.
PAPY, POOLE, WEISSENBORN
& PAPY
201 Alhambra Circle, Suite 502
Coral Gables, Florida, 33134

By Sheridan K. Weissenborn
Attorney for Appellees

CERTIFICATE OF SERVICE

I, SHERIDAN K. WEISSENBORN, a Member of the Bar of the Supreme Court of the United States and counsel of record for Charlie Vining and Velma Vining, his wife, Appellees herein, hereby certify that on May , 1980, pursuant to Rule 33, Rules of the Supreme Court, I served 3 copies of the foregoing Motion to Dismiss or, in the alternative, Motion to Affirm Judgment and the Appendix thereto on each of the parties herein as follows:

On Robert L. Dube' by depositing such copies in the United States Post Office, Coral Gables, Florida, with first-class postage prepaid, properly addressed to the Post Office address of Robert L. Dube', the above-named Appellant's counsel of record, at Suite 2608 New World Tower, 100 North Biscayne Boulevard, Miami, Florida 33132.

On Richard M. Gale, by depositing such copies in the United States Post Office, Coral Gables, Florida, with first-class postage prepaid, properly addressed to the Post Office Address of Richard M. Gale, the above-named Appellant's counsel of record at 924 Biscayne Building, 19 West Flagler Street, Miami, Florida 33130.

All parties required to be served have been served.
DATED this 21st day of May , 1980.

SHERIDAN K. WEISSENBORN
PAPY, POOLE, WEISSENBORN
& PAPY
201 Alhambra Circle, Suite 502
Coral Gables, Florida 33134

By Sheridan K. Weissenborn
Attorneys for Appellees

Appendix

APPENDIX A

Supreme Court of Florida

No. 56,897

CHARLIE VINING and VELMA VINING,
his wife,

Petitioners,

vs.

AVIS RENT-A-CAR SYSTEMS, INC.

Respondent.

[November 21, 1979]

PER CURIAM

Reversed. *See City of New Orleans v. Dukes,* 427 U.S. 297 (1976); *Katzenbach v. Morgan,* 384 U.S. 641 (1966); *Williamson v. Lee Optical Co.,* 348 U.S. 483 (1955); *Lasky v. State Farm Insurance Co.,* 296 So.2d 9 (Fla. 1974); *Finlayson v. Conner,* 167 So.2d 569 (Fla. 1964); *Riley v. Lawson,* 106 Fla. 521, 143 So. 619 (1932).

It is so ordered.

ENGLAND, C.J., ADKINS, OVERTON, SUNDBERG and ALDERMAN, JJ., Concur BOYD, J., Dissents with an opinion

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

BOYD, J., dissenting.

I respectfully dissent from the decision of the majority. I would hold that section 316.1975, Florida Statutes (1977),[1] is unconstitutional as a denial of equal protection of the laws.

The statute establishes a classification that does not rest upon a ground having a reasonable relation to the objective of the legislation. The purpose of the legislation is to prevent motor vehicle theft and to protect the public from hazardous driving by automobile thieves. A delivery vehicle is just as capable of being stolen if left unattended with the key in the ignition as is any other kind of motor vehicle. The fact that, without the exception for delivery vehicles, the law would inconvenience the owners and operators of such vehicles is no rational basis for the exception. The law inconveniences the owners and operators of all motor vehicles coming within the statute.

We should hold the statute unconstitutional so that the plaintiffs will have to establish negligence under

[1]316.1975 Unatteded motor vehicle. — No person driving or in charge of any motor vehicle except a licensed delivery truck or other delivery vehicle while making deliveries, shall permit it to stand unattended without first stopping the engine, locking the ignition, and removing the key. No vehicle shall be permitted to stand unattended upon any perceptible grade without stopping the engine and effectively setting the brake thereon and turning the front wheels to the curb or side of the street.

general principles of our tort law without relying on the statute to show violation of a duty of care.

Certiorari to the Circuit Court
in and for Dade County
John Gale, Judge, Case No. 74-11394

Sheridan K. Weissenborn of Papy, Duval and Poole, Coral Gables, Florida,
for Petitioners

Robert L. Dube' and Richard M. Gale, Miami Florida,
for Respondent

APPENDIX B

Supreme Court of Florida

WEDNESDAY, JANUARY 23, 1980

CASE NO. 56,897

In the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida
74-11394

CHARLIE VINING, et ux,
Petitioners,

v.

AVIS RENT-A-CAR SYSTEMS, INC.,
Respondent.

Upon consideration of the Petition for Rehearing filed by the attorneys for Respondent,

IT IS ORDERED by the Court that said Petition be and the same is hereby denied.

ENGLAND, C.J., ADKINS, OVERTON, SUNDBERG and ALDERMAN, JJ., concur BOYD, J., dissents

Respondent's Motion for Stay is hereby granted and proceedings in this Court and in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County,

Florida, are hereby stayed to and including February 22, 1980, to allow Respondent to seek review in the Supreme Court of the United States and obtain any further stay from that Court.

TC
cc: Hon. Richard P. Brinker, Clerk
Hon. John Gale, Judge

Robert L. Dube', Esquire
Richard M. Gale, Esquire
Papy, Levy, Carruthers & Poole

A True Copy
TEST:

Sid J. White
Clerk, Supreme Court

By: /s/ TANYA CARROLL
Deputy Clerk

APPENDIX C

IN THE SUPREME COURT OF FLORIDA

NO. 56,897

CHARLIE VINING and VELMA VINING,
his wife,
Petitioner,

vs.

AVIS RENT-A-CAR SYSTEMS, INC.,
Respondent.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Avis Rent-A-Car, Systems, Inc., the respondent above named, appeals to the Supreme Court of the United States from the final Order and decision of the Supreme Court of Florida; reversing the Amended Order Determining §316.097, Fla.Stat. and §30-249 of the Metropolitan Dade County Code Unconstitutional, of the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County, entered herein on November 21, 1979. A timely petition for rehearing was denied January 23, 1980.

This appeal is taken pursuant to 28 U.S.C. §1257.

Robert L. Dube
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Miami, Florida 33132
and
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19 West Flagler Street
Miami, Florida 33130

/s/ RICHARD M. GALE
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Notice of Appeal was sent priority mail to Papy, DuVal & Poole, 201 Alhambra Circle, Suite 502, Coral Gables, Florida 33134, Attorneys for Petitioners/Appellees, this 11 day of April, 1980.

/s/ RICHARD M. GALE

APPENDIX D

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

CASE NO. 74-11394 DIV 7

GENERAL JURISDICTION DIVISION

CHARLIE VINING and VELMA VINING, wife of CHARLIE VINING,
Plaintiffs,

vs.

AVIS RENT-A-CAR SYSTEMS, INC.,
Defendant.

MOTION FOR DETERMINATION OF THE CONSTITUTIONALITY VEL NON OF STATUTE AND ORDINANCE

Defendant, Avis Rent-A-Car Systems, Inc., by and through its attorneys, moves the Court for an order determining the Florida Unattended Motorist Vehicle Statute, Section 316.097, Fla.Stat. (1971) and the Metropolitan Dade County Code §30-249, to be unconstitutional and as grounds in support thereof, states:[1]

[1]The constitutionality *vel non* of the statute and Code is raised in the Amended Answer to the Third Amended Complaint.

1. Section 316.097, Fla.Stat. (1971), and Metropolitan Dade County Code §30-249, read as follows:[2]

> "No person driving or in charge of any motor vehicle *except a licensed delivery truck or other delivery vehicle while making deliveries,* shall permit it to stand unattended without first stopping the engine, locking the ignition, and removing the key. No vehicle shall be permitted to stand unattended upon any perceptible grade without stopping the engine and effectively setting the brake thereon and turning the front wheels to the curb or side of the street." (Emphasis added)

2. The aforesaid statute and ordinance are unconstitutional and void as both violate the Fourteenth Amendment of the United States Constitution by denying to the defendant equal protection of the laws and due process of law contrary to §1 of the 14th Amendment reading:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. Similarly the statute and ordinance violate Article 1, §2 of the Florida Constitution that "All natural persons are equal before the law . . . ." and violate Article 1, §9, Florida Constitution, providing:

[2]Chapter 76-31 §1, Laws of 1976 renumbered without amendment §316.097 to §316.1975, Fla.Stat. (Supp. 1976).

"No person shall be deprived of life, liberty or property without due process of law . . . ."

4. Both the unattended motor vehicle statute and the Dade County ordinance arbitrarily and unreasonably exempt a licensed delivery truck or other delivery vehicle while making deliveries from the restrictions imposed by the statute and ordinance on the defendant.

5. The exemption of delivery trucks from the restrictions imposed by the statute constitutes an unreasonable classification and a classification based upon no practical differences. Further, the said statute and ordinance create an exception without any rational or reasonable basis thus creating a legislative classification which is purely arbitrary and erroneous.

6. The Supreme Court of Florida in this action has ruled that §316.097, supra, as part of the "Florida Uniform Traffic Control Law" Chapter 71-135, Florida Laws (1971), was enacted mainly to promote the overall safety of the State's Highway system, not merely to reduce automobile thefts. *Vining v. Avis Rent-A-Car System, Inc.*, 354 So.2d 54 (Fla. 1977). The Supreme Court held:

> "The legislature recognized that an automobile placed in the hands of an unauthorized person was more likely to be operated in a manner hazardous to the well being of the general public. Statistical data provided strong support for this position . . .

> "Turning to plaintiff's complaint, he is clearly a member of the class Florida's 'Unattended Motor Vehicle' statute was intended to protect. Also, the injuries he sustained were the type the statute was designed to prevent."

7. It is patently evident that allowing a delivery truck to be exempt from the requirements of the statute is antithetical to the legislative scheme of protecting the public, inasmuch as, this type of vehicle by being permitted to stand unattended with the engine running (and merchandise, etc., inside) is more prone to be stolen. Accordingly, it is readily apparent that exempting the delivery truck is not a proper or reasonable classification but is arbitrary, unreasonable, and unjustly discriminatory; nor is there any rational or reasonable basis thus making the classification arbitrary and erroneous all of which denies to the defendant equal protection of the laws and due process of law.

Wherefore, defendant respectfully moves the Court to determine the constitutionality vel non of §316.097, supra, and §30-249 of the Metropolitan Dade County Code, and thereafter, to declare said laws unconstitutional.

Respectfully submitted,

ROBERT L. DUBE'
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and

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By /s/ RICHARD M. GALE
Richard M. Gale, *Of Counsel*

I hereby certify that a copy hereof was hand delivered to Papy, Duval, Poole & Usich, Attorneys for Plaintiffs, 201 Alhambra Circle, Coral Gables, Florida, this 9 day of April, 1979.

/s/ RICHARD M. GALE

APPENDIX E

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

CASE NO. 74-11394 — DIV. 07

GENERAL JURISDICTION DIVISION

CHARLIE VINING and VELMA VINING wife of CHARLIE VINING,
Plaintiffs,

vs.

AVIS RENT-A-CAR SYSTEMS, INC.,
Defendant.

AMENDED ORDER DETERMINING §316.097, FLA. STAT., AND §30-249 OF THE METROPOLITAN DADE COUNTY CODE UNCONSTITUTIONAL

THIS CAUSE coming on to be heard before the Court upon Defendant's Motion for Determination of the Constitutionality Vel Non of the Florida Unattended Motor Vehicle Statute, to wit: Section 316.097, Fla. Stat. (1971), and Section 30-249 of the Metropolitan Dade County Code, and the Court after hearing argument of counsel and being fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

1. Section 316.097, Fla. Stat. (1971), and Metropolitan Dade County Code §30-249, reading as follows:

> "No person driving or in charge of any motor vehicle except a licensed delivery truck or other delivery vehicle while making deliveries, shall permit it to stand unattended without first stopping the engine, locking the ignition, and removing the key. No vehicle shall be permitted to stand unattended upon any perceptible grade without stopping the engine and effectively setting the brake thereon and turning the front wheels to the curb or side of the street."

are hereby declared to be unconstitutional and void as both violate the Fourteenth Amendment of the United States Constitution by denying to the defendant equal protection of the laws and due process of law contrary to §1 of the 14th Amendment reading:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Similarly the statute and ordinance violate Article 1, §2 of the Florida Constitution that "All natural persons are equal before the law . . . ." and violate Article 1, §9, Florida Constitution, providing:

> "No person shall be deprived of life, liberty or property without due process of law . . ."

3. Both the unattended motor vehicle statute and the Dade County ordinance arbitrarily and unreasonably exempt a licensed delivery truck or other delivery vehicle while making deliveries from the restrictions imposed by the statute and ordinance on the defendant.

4. The exemption of delivery trucks from the restrictions imposed by the statute constitutes an unreasonable classification and a classification based upon no practical differences.[1] Further, the said statute and ordinance create an exception without any rational or reasonable basis thus creating a legislative classification which is purely arbitrary and erroneous.

5. It is patently evident that allowing a delivery truck to be exempt from the requirements of the statute is antithetical to the legislative scheme of protecting the public, inasmuch as, this type of vehicle by being permitted to stand unattended with the engine running (and merchandise, etc., inside) is more prone to be stolen. Accordingly, it is readily apparent that exempting the delivery truck is not a proper or

---

[1]The Court finds that the plaintiffs' argument that the delivery trucks are reasonably classified in the statute as the same or part of a commercial enterprise to be without merit. For, it could be similarly argued that a rental company is a commercial enterprise and should likewise enjoy a favored legislative exemption for the purpose of leaving the key in the ignition of it's rental automobiles at its place of business. (as alleged in the Third Amended Complaint).

reasonable classification but is arbitrary, unreasonable, and unjustly discriminatory; nor is there any rational or reasonable basis thus making the classification arbitrary and erroneous all of which denies to the defendant equal protection of the laws and due process of law.

DONE AND ORDERED at Miami, Dade County, Florida, this day of May, 1979.

CIRCUIT JUDGE

APPENDIX F

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 74-11394 (07)

CHARLIE VINING and VELMA VINING, wife of CHARLIE VINING,
Plaintiffs,

-vs-

AVIS RENT A CAR SYSTEMS, INC.,
Defendant.

The above-entitled cause came on for hearing before the Hon. Judge Gale, Judge of the above-styled Court, in the Dade County Courthouse, Miami, Florida, on Thursday, April 12, 1979, at 2:00 o'clock p.m., pursuant to Notice.

[2] APPEARANCES:

PAPY, DuVAL & POOLE, by
SHERIDAN K. WEISSENBORN, ESQ.
Attorneys for Plaintiffs.

RICHARD M. GALE, ESQ. and
ROBERT L. DUBE', ESQ.,
Attorneys for Defendant.

[3] [Thereupon, the following proceedings were had:]

MR. GALE: Judge, whatever is your pleasure, we have a motion for the Court to determine the constitutionality of the unattended motorists vehicle statute and which was served Monday on the Plaintiffs. The Plaintiffs in turn, at least the first time I have seen it, have served us with a motion to strike and, if the Court please, we will address ourselves to the motion to strike to the argument on the constitutionality of the statute and then they can have their reply, if it so suits the Court and we would like to have our final reply.

THE COURT: All rights.

MS. WEISSENBORN: Did my motion to strike get in the Court file?

THE COURT: No.

MS. WEISSENBORN: What it is, Your Honor, I was handed at quarter to five on Monday afternoon, the motion to declare this particular statute unconstitutional, which really is not sufficient time to prepare for this type of argument.

Secondly, what they are attempting to do at this point is have this Court hear a motion for summary judgment on this issue and, therefore, grant them a partial judgment and they have not complied with the twenty-day requirement of the motion for summary judgment pursuant to [4] the Florida Rules of Procedure.

Of course, we are moving to strike this particular hearing at this time based upon those grounds.

Furthermore, under the case of Airvac, Inc. versus Ranger Insurance Company, [330 So. 2d 467] really the defendant is not entitled to raise this argument at this point. It was up to the Supreme Court once before and in being there, the Supreme Court made certain rulings and now to come back and amend pleadings under the Airvac decision, is not permissible. And then the petition for re-hearing which was attached thereto, is based upon the fact that, in effect, they tried to raise, without coming out and saying the statute was unconstitutional, they tried to raise it in their petition for hearing before the Supreme Court when they brought out the statute did exempt delivery trucks and that the Court overlooked the fact that these delivery trucks had been exempted and therefore, in attempting to say to the Supreme Court that the statute is not a valid statute.

Basically that is as to my argument on the motion to strike.

MR. GALE: If the Court please, the issue of the constitutionality of the statute was raised in a motion asking leave of Court to file an amendment to the third amended answer on January 10, 1979, almost three months [5] ago, so the Plaintiffs have been well aware of the raising of this particular issue and Plaintiffs have been permitted to amend their original complaint no less than three times and certainly the Court should be liberal in allowing an amendment as it did back on January 19, so no prejudice has been shown.

Now the Plaintiffs raise and cite to the Court and rely completely on the Airvac versus Ranger Insurance Company case which is cited in the motion to strike and in the Airvac case, Your Honor, that was a case where the insurer, four days prior to trial, attempted to amend the Answer to include a defense that there was a fraudulent conveyance. The trial Court denied that motion to amend.

THE COURT: There is no question about that.

MR. GALE: Okay. We don't have to bother.

THE COURT: The Appelant Courts have said that in a jillion cases.

MR. GALE: Right, but where it is raised in the lower court, you have to raise it on the appeal and in our case the constitutionality of the statute was never raised because there was existing law at that time that the theft of an automobile would be an intervening cause which would break the chain of causation and the owner of the automobile would not be liable and the matter of constitutionality of the statute was never reached actually until [6] after the decision of the Supreme Court.

It was represented that the issue of the constitutionality of the statute was raised by some means in the petition for re-hearing. This was not the case. Unfortunately Counsel was not at the argument before the Supreme Court as I was. Mr. Papy was there, but during the argument there was a conversation more or less between Judge England and myself as to what was the legislative intent of this statute, and it was

argued by the Defendant that the legislative intent was to reduce the amount of thefts, rather than that the legislative intent in promulgating the unattended motorist vehicle statute was to protect the public because the statute excepted delivery trucks. In other words, you could leave a delivery truck with its motor running and the key in the ignition and, therefore, this seemed to be contrary to any intent of the legislature that the safety of the public was involved. Notwithstanding, the Supreme Court, in a four to three decision, held that the statute was enacted to promote the overall safety of the state highway system rather than reduce the amount of automobile thefts and the legislative scheme was to, in effect, protect the general public, so it was after the decision itself that it became apparent that the exception of delivery trucks from the statute was contrary to the protection of the public and constituted [7] an arbitrary and unreasonable classification, and thus the constitution issue was raised at that time and we have timely raised the constitutional issue.

With the Court's permission, we would proceed now to argue the grounds and reasons why we feel that the statute, the unattended motorists vehicle statute and the county ordinance which tracks the language of that statute, is unconstitutional and void as being contrary to the Fourteenth Amendment of the United States Constitution, equal protection of laws and due process of law and why it is contrary to Article One, Section Two of Florida Constitution, equal protection and Article One, Section Nine of the Florida Constitution, due process of law.

It is obvious that a delivery truck stopped in the street —

THE COURT: I am getting homesick with this.

MR. GALE: Thank you, Judge, — that a delivery truck left on the street with the motor running and the key in the ignition and with merchandise in the truck, is very prone to being stolen.

THE COURT: Let me just stop you. I understand that, but I think you should center your argument around why there should be no distinction between trucks — this was not a truck, was it?

MS. WEISSENBORN: No. Ours was a rental car.

[8] THE COURT: — why there should not be that distinction.

MR. GALE: Because in the test, whether to determine the equal protection of laws has been met, you have to examine whether a statutory classification such as the one here exempting trucks, the test is whether the classification, as I understand it from the cases, rests on some difference bearing on reasonable relation to the objective of the legislation.

Now, the objective of the legislation, as announced by the Supreme Court, is to protect the public. It is for the safety of the public. That is the objective of the legislation and obviously, if you are allowed to stop a truck, leave its motor running with the key in the truck and make it so easy to be stolen —

THE COURT: It is just as unsafe as a car.

MR. GALE: Exactly.

THE COURT: Why don't you anticipate her argument that this is different because commerce was involved and there may be some necessity of distinction.

MR. GALE: The distinction is not there, Your Honor, because a stolen truck is just as dangerous, if not more dangerous, than a stolen automobile and it should also be parenthetically mentioned that the state police powers are not absolute and any legislation resting on the police [9] powers, to be valid, must serve the public welfare as distinguished from the welfare of a particular group or class and here this legislation, which we don't have any basis for it except that it's pretty obvious some lobbying group got in there and got this passed to exempt delivery trucks — this legislation is made for the welfare of delivery trucks only and this is a wrongful abuse of the police powers, a wrongful exercise of the police powers by the legislature.

Unfortunately our research did not reveal any case directly on point but we would respectfully bring to the Court's attention the case of Moore versus Thompson cited at 126 So. 2d 543. There the Supreme Court examined the constitutionality of a Sunday closing law, which was applicable at that time only to used car dealers, and the Supreme Court held that statute to be unconstitutional, finding that the valid and substantial reasonable yardstick has not been met which would allow the legislature to make such a law operate upon that one class of business rather than generally upon all and it went on to say, the Supreme Court, that if the legislature speaks to proscribe a business from operating on a Sunday, it must prohibit all businesses from operating on Sunday unless there is some rational basis for classifying used car dealers differently and we could

draw an analogy in the instant [10] case and say that if automobiles, motor vehicles, are to be stopped, have the engine turned off and the key removed in order to protect the public, then certainly trucks in a similar manner should be stopped, have the motors turned off and the key removed.

Quite simply, we would further contend that the exception of delivery trucks in the statute is irrational and the exception certainly flaunts the purpose of the legislature in promulgating this statute.

There is really no practical difference from a safety objective between leaving a passenger motor vehicle unattended with the key in the ignition, than there is in leaving a truck unattended with the key in the ignition.

THE COURT: Okay. I get your argument.

MS. WEISSENBORN: Your Honor, first of all under the constitution aspect of it, the Supreme Court of the United States has held that you do not have to have mathematrical nicety and you do not have to be precise on these classifications and, in fact, in some practices there will be a little bit of inequity so the absolute one hundred percent equality of the classes is not the test.

The Supreme Court in this Vining case which we have hashed around on numerous occasions, held that the statute was mainly — it didn't say that it was entirely passed for the promotion of public safety but it, in fact, was passed [11] mainly and they then indicated that our client, Mr. Vining, was one of those individuals who was to be protected.

Now as to the argument that this is an unreasonable classification, the truth is that there is a big difference. These delivery trucks are in and out. These cars, the tendency, especially in this instance, these cars are left out at night with keys in them out at the airport. Cars left on the street normally are not going —

[Discussion off the record.]

MS. WEISSENBORN: Anyway, the classification would not be an unreasonable classification. Furthermore this Court, based upon the law in Florida, this is a statute which obviously the Supreme Court has said that partially it was to protect the safety on the highways and, therefore, it is an act that was passed on under the police powers and when you have such a case, the test is that this court must use that if there is a statement of fact which can reasonably be conceived —

THE COURT: That is true under all statutes. If I can possibly find a rationale for it.

MS. WEISSENBORN: Right. You can imagine the chilling effect most of the time — and we can take downtown Flagler Street as an example — most of the time during the early morning hours we have deliveries that are being made. [12] Many of these goods are obviously interstate commerce. Can you imagine the chilling effect it might have if every time a delivery truck pulls in front of a building it has to stop, turn off the keys and in many instances they are blocking the thoroughfares and, therefore, are a danger to the highways anyway and the theory or idea was to keep

them moving, keep them progressing on so they would not continually block the street.

If we start now taking all these delivery people, taking their keys out while they are making deliveries, Lord knows how many people are going to lose their keys or the problems that would occur. The purpose was to prevent these joy riders, the main thing, youths joy riding, and because these cars were left in an area where the people were gone off and there was not a great deal of activity so, of course, the thefts would be a lot easier.

THE COURT: Where was this car left?

MS. WEISSENBORN: At Miami International Airport. There is a question, I believe, of fact — I am not even sure if it is a question of fact — whether it was in their compound at night or whether it was returned to their place of rental check-in, but it was definitely not left in the street with knowledge of that high incidence of theft, so in effect the exception here on the delivery is [13] also for the protection of people on the highway so that people are not running into them and causing great traffic congestions and problems there.

THE COURT: The only thing, there is a lot of inconsistency in this statute that bothers me. First of all, it seems there should be no distinction when you look at it objectively. A motor vehicle is a motor vehicle, and keys are keys, and theft is theft. I don't really see any difference between a street downtown and at the airport but forgetting about that argument, if you are going to use the exception of commerce, wouldn't this be commerce, too?

MS. WEISSENBORN: Yes. This is part of commerce.

THE COURT: You are talking about chilling effect, what would happen, all these cars get turned in at the airport and people are not familiar with the traffic pattern, they leave the car and they leave it right there in the compound where cars are usually left. I don't see the distinction.

MR. WEISSENBORN: There is a difference between inter-state commerce that is as a whole.

THE COURT: It is not all inter-state commerce. It can be local trucks or county trucks.

MS. WEISSENBORN: But also they might be cargos which are inter-state.

[14] THE COURT: The cars could be carrying people from other states.

MS. WEISSENBORN: But the plane is, with inter-state but not the cars.

THE COURT: I really can't see a distinction. I don't think it should be an exception for any motor vehicle but if there is going to be an exception it would be a classic example where this would be the same thing as a truck. It is a commercial incident.

MS. WEISSENBORN: Well, it is hard to explain but it is really not. A commercial vehicle is in and out, this type of a thing. That is not the situation that we have.

THE COURT: But you said you wanted trucks to get in and out, too. That argument seems to apply to both. I am not sure whether that should be it either but I am just saying that there is an inconsistency. I can't imagine why they exclude trucks because I am sure there is the same percentage of trucks stolen as cars.

MS. WEISSENBORN: I am not prepared to argue that. The United States —

THE COURT: As a matter of fact, it would be more advantageous in stealing a truck with all the goods in it.

MS. WEISSENBORN: Apparently that is not what the studies have shown which have been before the Congress which is why the statute was written, was why the statute [15] was passed which told all the car companies that they had to make the new vehicles so that the keys would be removed with the buzzers. This is an ordinance with the Federal regulations. The studies have shown that the majority of these thefts are by youths and joy riders and they are canvassing areas where there are high crime rates and that is where they are stealing these vehicles. The studies have not shown that it is done in commerce industry with these delivery trucks where they are running in and out. There you have got people picking goods out of the trucks.

THE COURT: You hear every day about people stealing these trucks with liquor in them and furs. I have a tendency to agree that this is a badly framed statute and I think this, because it is badly framed, that it indicates an invalid classification. In any event, I am going to allow you to amend.

Where is your other motion? Is this my motion calendar?

MR. GALE: The amendment was allowed by Your Honor on January 19th.

MS. WEISSENBORN: They have asked this Court to declare this statute, by motion, unconstitutional and my motion was to strike it on the grounds that they are asking for summary judgment and I did not get sufficient [16] notice. There is no twenty-day notice from Monday until today.

THE COURT: Is this a summary judgment hearing?

MR. GALE: No. I never thought of a summary judgment hearing. I still don't see it under any stretch of the imagination. We are asking today that the Court determine the constitutionality of the statute.

THE COURT: I think this is a situation to illustrate the bad wording of the statute. If it was a strictly automobile case, I don't know how I would react to that but I fail to see the difference if you are going to use a commercial argument, between a rental car left at the airport, with delivery trucks or vans that deliver goods in commerce. I don't think there should be a distinction at all.

MS. WEISSENBORN: The one thing I have to say is that they only got allowed to come in here and do this because originally on the eve of the first time this case was set for trial on January 19th, this case was set for trial on the eve of that, they came in here and asked

this court to amend and then all of a sudden they asked this court to give them a continuance because they were changing trial counsel.

As you can see, the same counsel are here. We should have gone to trial. You wouldn't let me have a continuance [17] a month before the trial because I had not gotten my discovery but then you allowed them a continuance to get new trial counsel.

THE COURT: I don't usually continue a case.

MR. GALE: Mr. Dube' would know about that.

MS. WEISSENBORN: Mr. Gaine was here and the Court said — there was an order of continuance. You never even let us go to trial because you gave them the continuance.

THE COURT: I do that, for example, my next two-week trial calendar is and I think it is only fair if I can tell them beforehand.

MS. WEISSENBORN: If the Court is going to rule that that statute is unconstitutional at this time, I am going to ask the Court to stay the trial so I can go to the Supreme Court.

THE COURT: There is nothing wrong with that.

MS. WEISSENBORN: Before I do this, I would rather talk to my client. I don't think it prevents us from proceeding to trial, the fact that the statute is declared unconstitutional.

THE COURT: I will go either way.

MS. WEISSENBORN: I will ask the client and I will consult with my client.

THE COURT: Just submit an order. No hearing is necessary on that.

[18]

CERTIFICATE

I, VIRGINIA ANN HESSLEIN, Certified Shorthand Reporter in the State of Florida hereby certify that I reported the foregoing hearing before the Hon. John Gale, Judge of the above-styled Court, at the time and place herein above set forth; that the foregoing pages numbered from 1 to 17, inclusive, constitute a true and correct transcription of my shorthand report of the proceedings at said hearing.

WITNESS my hand this day of April, 1979.

[17] [Thereupon, the hearing was concluded at 3 p.m.]

APPENDIX G

IN THE SUPREME COURT OF FLORIDA

CASE NO.:

CHARLIE VINING and VELMA VINING, his Wife,

Petitioners,

vs.

AVIS RENT-A-CAR SYSTEMS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA.

TO THE SUPREME COURT OF THE STATE OF FLORIDA:

Petitioners, CHARLIE VINING and VELMA VINING, his Wife, by and through their undersigned counsel, present this, their Petition for a Writ of Certiorari and state:

1. Petitioners seek to have reviewed a decision of the Circuit Court of the Eleventh Judicial Circuit, In and for Dade County, Florida, dated April 19, 1979 and amended on May 1, 1979 (AA1, A1-3). Said decision

makes the determination that, the "Florida Unattended Motor Vehicle Statute," Section 316.1975 (1976), denies the Respondent the equal protection of the laws and due process of law in violation of the Fourteenth Amendment of the United States, and Article 1 Section 2 of the Florida Constitution, and Article 1 Section 9 of the Florida Constitution, and therefore is unconstitutional vel non. (A1-2).

2. This Petition is presented under and pursuant to Article V, Section 3(b)(3) of the Florida Constitution, and Rules 9.030(2)(B), and 9.100 of the Florida Rules of Appellate Procedure.

3. The facts upon which the Petitioners rely are as follows:

(a) The Petitioners sued the Respondent in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, for personal injuries arising out of an automobile accident involving an automobile owned by the Respondent, which had been stolen from the Respondent's parking lot at the Miami International Airport.

(b) The trial court granted a Motion to Dismiss the Third Amended Complaint with prejudice, and an appeal was taken to the Third District Court of Appeal. The appeal to the Third District Court of Appeal resulted in a Certiorari to this Honorable Court pursuant to Article V, Section 3(B)(3) as being a decision which was one of "great public interest." *Vining v. Avis,* 354 So.2d 54 (Fla. 1977). (A4-9).

(c) This Honorable Court framed the issue as being whether the owner of a vehicle, who leaves it unlocked and unattended while the keys are in the ignition in violation of the Florida Unattended Motor Vehicle Statute, Section 316.097, Florida Statutes (1975) renumber Section 316.1975 (1976), is liable for the conduct of a thief who steals the vehicle and subsequently injures another through negligent operation. This Honorable Court then determined that there was a jury question on the issue of forseeability and reversed the trial court's decision reinstating this case for trial. (A4-9).

(d) On or about January 1979, the same trial court granted the Respondent's motion to amend its answer to state as an affirmative defense that the Florida Unattended Motor Vehicle Statute was unconstitutional.

(e) Respondent, thereafter, filed a Motion for Determination of the Constitutionality Vel Non of the Statute and the Metropolitan Dade County Ordinance Section 30-249, which was exactly the same. The basis of the motion was that the Statute exempted delivery trucks from the requirement of removing the keys from the ignition and this denied the Defendant the equal protection of the laws and due process of law as granted by the Florida and U.S. Constitutions. (A 34-36).

(f) At a hearing on the motion the trial court found that the "Florida Unattended Motor Vehicle Statute" and the Metropolitan Dade County Ordinance, which follows the Florida Statute, are unconstitutional and void as both violate the Fourteenth Amendment of the United States

Constitution by violating the equal protection of the laws and due process of law contrary to Section 1 of the Fourteenth Amendment. (AA1, A1-3).

(g) Further, the trial court found that the Statute and Ordinance violate Article 1 Section 2 of the Florida Constitution and Article 1 Section 9 of the Florida Constitution providing that no person shall be deprived of life, liberty or property without due process of law . . . (A-2).

(h) It was the trial court's determination that the Statute and Dade County Ordinance arbitrarily and unreasonably exempted licensed delivery vehicles from the restrictions imposed by the Statute when there were no practical differences between the delivery vehicles and rental car vehicles which are likewise part of a commercial enterprise. Thus, the court determined that rental cars should likewise enjoy the exemption created in the Statute and, therefore, the Statute was unjustly discriminatory, and denied the Respondent the equal protection of the laws. (A 2).

4. Petitioners are seeking from this Honorable Supreme Court a Writ of Certiorari to issue to the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, determining the constitutionality of Section 316.097 renumbered Section 316.1975 (1976) Florida Statute as raised by the Question Presented:

> WHETHER THE FLORIDA UNATTENDED MOTOR VEHICLE STATUTE, SECTION 316.097 RENUMBER 316.1975 (1976) FLORIDA STATUTES, DENIES THE

RESPONDENT THE EQUAL PROTECTION OF THE LAW AND DUE PROCESS OF LAW AS GUARANTEED BY THE U.S. AND FLORIDA CONSTITUTIONS.

Without such a determination the Petitioners will suffer irreparable harm in that there is doubt as to whether or not this Honorable Court had based its previous decision on the fact that there was an Unattended Motor Vehicle Statute and, therefore, that this Honorable Court's previous decision, wherein, it relied upon the Statute, made the Statute an integral part of the Petitioners' cause of action.

5. ARGUMENT

THE FLORIDA UNATTENDED MOTOR VEHICLE STATUTE SECTION 316.097 RENUMBERED SECTION 316.1975 (1976) FLORIDA STATUTES, DOES NOT DENY THE RESPONDENT THE EQUAL PROTECTION OF THE LAW AND DUE PROCESS OF LAW AS GUARANTEED BY THE U.S. AND FLORIDA CONSTITUTIONS.

A statute is presumed to be constitutional and should never be nullified unless it is found to the contrary beyond a reasonable doubt. *Croissant v. Harris,* 121 Fla. 141, 163 So. 470 (1935); *Campbell v. Johnson,* 182 So.2d 244 (Fla. 1966).

The above principles also apply when the movant is seeking to have a statute declared null and void when it

has been enacted pursuant to the police power. *McInerney v. Erwin,* 46 So.2d 458 (Fla. 1950). Furthermore, if there are any state of facts which can reasonably be conceived to sustain the exercise of the police power, the existence of that state of facts will be assumed by the courts. *Ex Parte Lewis,* 101 Fla. 624, 135 So. 147 (1931).

Hence, before the trial court in the instant case could declare the Florida Unattended Motor Vehicle Statute unconstitutional, it had to have been shown beyond a reasonable doubt that the exemption for delivery vehicles was arbitrary and unreasonable, and that there were absolutely no facts reasonably conceived which would sustain the constitutionality of the Statute.

The classification will not offend the Constitution because it is not made with mathematical precision, nor because in practice — use — it results in some inequality. *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1910).

In the instant case, the exempted class is based upon *a use.* The Statute exempts those delivery vehicles *in use* while making deliveries, from the requirements of removing the keys and turning off the engine.

The Respondent, on the other hand, allows his vehicles to stand unattended with keys in them when not in use (A10-14, 38-40). There is Absolutely no way that one can conceive these two situations to be similar in use.

In the instant case, the trial court determined, as a basis for its decision, that delivery trucks and rental cars are commercial enterprises and, therefore, the Respondent should likewise enjoy a favored legislative exemption. This argument is without merit, since it is the use which is exempted and not the vehicle. Delivery vehicles are not entitled to the exemption if they are not making deliveries. They must comply like any other vehicle under the Statute if they are not making those deliveries. Hence, the commercial enterprise reliance of the trial court is erroneous under the facts of the instant case.

Furthermore, one of the purposes of the Statute is to protect the overall safety on the highways. It is not merely to protect theft. However, the trial court reasoned that delivery vehicles are subject to theft like any other vehicle and as such should not be favored. This contention is without merit if there are any conceivable facts which would sustain the exercise of the police power. *Exparte Lewis, supra.*

Delivery vehicles are most often left in the streets while deliveries are being made. They block the right-of-ways and they cause traffic backups. To force all delivery trucks to turn off the engines and remove the keys, when oftentimes the driver merely runs in and out of an establishment to make its delivery increases the time in which that vehicle causes chaos in the streets. Furthermore, what a horrible condition would occur if keys were misplaced during the delivery process, or if they failed to start again.

Rental cars on the other hand have been left by the drivers so that the rental cars can be serviced and made

ready to be re-rented. They are not left for such short periods of time in the roadway where other vehicles are traveling. Nor are they left unattended with a driver in close proximity.

There is one other sound basis for exempting delivery vehicles, while making deliveries, and that is the maintenance of rapid movement of goods in interstate commerce. These goods must be moved quickly and effectively.

Rental cars left at an airport, like those of the Respondent, are not in a similar situation to delivery vehicles. Equal protection means that the rights of all persons must rest upon the same rule under *like* circumstances, and the regulations should affect alike all persons similiary situated and conditioned with reference to the subject regulated. *State ex rel. Spencer v. Bryan,* 87 Fla 56, 99 So. 327 (1924).

In the instant case the situations are not similar. Furthermore, the Statute is not made for the welfare of delivery vehicles, for if this were true delivery vehicles would be exempt at all times, including when the driver has stopped for lunch. This is not the case. If delivery vehicles are not in the process of making a delivery they would not be exempt. It is, therefore, not the business which is being regulated it is the manner or use within that business.

There is no irrationality or unreasonable classification in the Florida Unattended Motor Vehicle Statute. The Statute is not unjustly discriminatory, arbitrary, or unreasonable. Hence, this Honorable Court

should grant the Petition for Certiorari and reverse the trial court's ruling.

WHEREFORE, the Petitioners respectfully petition this Honorable Court for a Writ of Certiorari directed to the court below to review its ruling in declaring the Florida Unattended Motor Vehicle Statute unconstitutional, and enter its Order quashing the Order and decision sought to be reviewed, and granting such other and further relief as shall seem right and proper to the Court.

Respectfully Submitted,

SHERIDAN K. WEISSENBORN,
ESQ.
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Tel. No.: (305)446-5100

BY: /s/ SHERIDAN K.
WEISSENBORN
SHERIDAN K. WEISSENBORN,
ESQ.

Attorney for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the above and foregoing was mailed to PAUL LARKIN, ESQ., 2400 First Federal Building, One Southeast Third Avenue, Miami, Florida 33131; ROBERT L. DUBE', ESQ., Suite 2628 New World Tower, 100 North Biscayne Boulevard, Miami, Florida 33132; and to Office of the ATTORNEY GENERAL OF FLORIDA, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33132, this 21ST day of MAY, 1979, and to RICHARD M. GALE, ESQ., Biscayne Bldg., Miami, Florida, on this date.

/s/ SHERIDAN K.
WEISSENBORN
SHERIDAN K. WEISSENBORN,
ESQ.

APPENDIX

IN THE SUPREME COURT OF FLORIDA

CHARLIE VINING and VELMA VINING,
wife of CHARLIE VINING,
Petitioners,

v.

AVIS RENT-A-CAR SYSTEMS, INC.,
Respondent.

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AMENDED ORDER DETERMINING SEC. 316.097 FLA. STAT., AND SEC. 30-249 OF THE METROPOLITAN DADE COUNTY CODE UNCONSTITUTIONAL A1-3

OPINION, VINING v. AVIS, 354 So.2d 54 Fla. (1977) A4-9

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IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

CASE NO. 74-11394 DIV 7

GENERAL JURISDICTION DIVISION

CHARLIE VINING and VELMA VINING wife of CHARLIE VINING,
Plaintiffs,

vs.

AVIS RENT-A-CAR SYSTEMS, INC.,
Defendant.

ORDER DETERMINING §316.097, FLA.STAT., AND §30-249 OF THE METROPOLITAN DADE COUNTY CODE UNCONSTITUTIONAL

THIS CAUSE coming on to be heard before the Court upon Defendant's Motion for Determination of the Constitutionality Vel Non of the Florida Unattended Motor Vehicle Statute, to wit: Section 316.097, Fla.Stat. (1971), and Section 30-249 of the Metropolitan Dade County Code, and the Court after hearing argument of counsel and being fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

1. Section 316.097, Fla.Stat. (1971), and Metropolitan Dade County Code §30-249, reading as follows:

> "No person driving or in charge of any motor vehicle except a licensed delivery truck or other delivery vehicle while making deliveries, shall permit it to stand unattended without first stopping the engine, locking the ignition, and removing the key. No vehicle shall be permitted to stand unattended upon any perceptible grade without stopping the engine and effectively setting the brake thereon and turning the front wheels to the curb or side of the street."

are hereby declared to be unconstitutional.

DONE AND ORDERED at Miami, Dade County, Florida, this 19th day of April, 1979.

JUDGE JOHN GALE
CIRCUIT JUDGE

[Received APR 23 1979]

APPENDIX H

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 74-11394 (07)

CHARLIE VINING and VELMA VINING, Wife of CHARLIE VINING,

Plaintiffs,

vs.

AVIS RENT-A-CAR SYSTEMS, INC.,

Defendant.

INTERROGATORIES

PURSUANT to the applicable Rules of Procedure, the Plaintiffs (s), CHARLIE VINING and VELMA VINING, Wife of CHARLIE VINING, by and through undersigned counsel, propound(s) the attached Interrogatories to the Defendant, AVIS RENT-A-CAR SYSTEMS, INC., to be answered in writing, under oath, within your knowledge or the knowledge of your agent(s), servant(s), employee(s), or attorney(s), and within the time provided by and in accordance with said Rules.

PLEASE ANSWER THE FOLLOWING INTERROGATORIES:

SEE ATTACHED INTERROGATORIES

WE HEREBY CERTIFY that the original and 1 copies of the attached Interrogatories were HAND DELIVERED this 15TH day of NOVEMBER, 1978, to:

ROBERT L. DUBE', ESQ.
100 North Biscayne Blvd.
Miami, Florida 33132

PAPY, DUVAL, POOLE
& USICH
Attorneys for
201 Alhambra Circle, Suite 502
Coral Gables, Florida 33134
Telephone: 446-5100

By: /s/ SHERIDAN K.
WEISSENBORN
SHERIDAN K.
WEISSENBORN,
ESQ.
Attorney for Plaintiffs.

INTERROGATORIES

1. In January of 1973 please state whether Avis had its own parking lot at the Miami International Airport in which it kept its vehicles that were not on lease.

ANSWER: Yes.

2. Was it Avis' policy in January 1973 to allow vehicles to stand overnight in its parking lot with keys in the ignition.

ANSWER: Keys were kept at the rental centers once they were brought up to the rental slots. In the enclosed service area where the cars (con't. were mechanically checked and washed the keys were kept in the cars pg. 1A)

3. In January of 1973 was it Avis' policy to allow automobiles which had been returned from rental to remain unattended with emergency lights flashing.

ANSWER: NO.

4. If the above question is answered in the affirmative, please state why said vehicles were left with the lights flashing in January of 1973, and who enacted said policy for the Company.

Not applicable by virtue of Answer to Interrogatory No. 3.

5. With reference to the copy of the Rental Contract which Defendant has attached to the prior

answer to Interrogatories, please state where it says Miami Intapo, whether that means the Miami International Airport, and if so, where it states "Time In" under number 22, as January 11, 1973 at 1633, if that refers to the fact that the vehicle was returned to the Miami International Airport on that date.

ANSWER: Yes.

6. In further regards to the above Contract, please state who signed in on said document as accepting the car and totaling the amount of money. And further, what the initials "DBR'D TO WHQ" mean.

ANSWER: Rental Agent, Nancy Gaylog

DBR to WHQ means that money placed on "Daily Business Report" and said report was transmitted to "World Headquarters" on date stamped.

7. Please state the name, address and job title of the person who has custody of the Rental Contract which is referred to above.

ANSWER: The Rental Contract was attached to Defendant's Answers to previous Interrogatories propounded by the plaintiffs. The persons in custody and control of said Rental Contract are the undersigned; Avis Rent-A-Car System, Inc., New York; and Sheridan K. Weissenborn, Plaintiffs' Attorney.

2. CONTINUED

so they could be more quickly serviced. This was an enclosed area and personnel on duty 24 hours.

/s/ [Illegible]
(Signature of Answering Party)
THOMAS F. MARTIN, Florida State Fleet Manager, Avis Rent-A-Car System, Inc.

STATE OF FLORIDA :
SS
COUNTY OF DADE :

BEFORE ME, the undersigned authority, this day personally appeared THOMAS F. MARTIN, who being by me first duly sworn, deposes and says that (s)he executed the foregoing Answers to Interrogatories and that they are true and correct to the best of his/her knowledge and belief.

WITNESS my hand and official seal at Miami Dade County, Florida, this 15th day of December, 1978.

/s/ CHRISTINE F. RUSSELL
NOTARY PUBLIC

My commission expires:
NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPRIES MAY 25, 1981
BONDED THRU GENERAL INS. UNDERWRITERS

WE HEREBY CERTIFY that the original of the foregoing Interrogatories and the Answers thereto were filed with the Court on the 15th day of December, 1978, and that a copy thereof was furnished to PAPY, DuVAL, POOLE & USICH, 201 Alhambra Circle, Suite 502,

Coral Gables, Florida, 33134, by (mail) this 15th day of December, 1978, and to:

ROBERT L. DUBE'
Attorney for Defendant
Suite 2608, New World Tower
100 North Biscayne Boulevard
Miami, Florida 33132
Telephone — 374-7472
/s/
Attorneys for: Defendant
BY:

STATE OF FLORIDA)
) ss.
COUNTY OF DADE)

BEFORE ME, the undersigned authority, on this day personally appeared, THOMAS F. MARTIN, Florida State Fleet Manager, Avis Rent-A-Car System, Inc., who being first duly sworn, deposes and says that he has read the foregoing Answers to Interrogatories knows the contents thereof, and that to the best of his knowledge and belief, the same are true.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal this 15th day of December, 1978.

/s/ CHRISTINE FRANCES RUSSELL
Notary Public

NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES MAY, 25, 1981
BONDED THRU GENERAL INS. UNDERWRITERS

I CERTIFY that a true copy of the foregoing Answers to Interrogatories were hand-delivered to PAPY, DUVAL, POOLE & USICH, Attorneys for Plaintiff, 201 Alhambra Circle, Suite 502, Coral Gables, Florida 33134, this 21 day of December, 1978.

ROBERT L. DUBE'
Attorney for Defendant
Suite 2608, New World Tower
100 North Biscayne Boulevard
Miami, Florida 33132
Telephone — 374-7472

By Robert L. Dube

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 74-11394 (07)

CHARLES VINING and VELMA VINING,
wife of CHARLIE VINING,
Plaintiffs,

-vs-

AVIS RENT-A-CAR SYSTEMS, INC.,
Defendant.

201 Alhambra Circle, Suite 502,
Coral Gables, Florida,
Tuesday, 11:10 a.m.
January 9, 1979.

DEPOSITION OF NANCY GAYLOG

Taken on behalf of the Plaintiffs before Virginia Ann Hesslein, Certified Shorthand Reporter and Notary Public in and for the State of Florida at Large, pursuant to Notice of Taking Deposition filed in the above cause.

[8] Q. Did anyone ever do that, put on flashing lights to indicate that the keys were in them?

A. If the check-in man was getting a group of cars ready to be picked up, he might do that.

Q. He is the check-in man?

A. Yes.

Q. He had a group of cars there ready to be picked up and he would turn the back flashing lights on?

A. Yes.

Q. Is that correct?

A. Yes.

Q. I guess maybe you could have anywhere from one to ten cars doing that?

A. It's kind of hard to say.

Q. I know it's different at different times, probably busier at certain times than others?

A. You are talking about back then?

Q. Yes.

A. I don't really — I can't recall.

Q. They would just come up in a group and take these cars or just take them, based upon the number of personnel or service agents they had to come and pick them up, those with the lights flashing and the keys in them?

[14] A. Well, I was the check-in agent now. I don't know what security they had.

Q. These keys, when they take them back to the service area after the car has been serviced, they are left in the cars; is that correct?

A. Yes.

Q. Do you know how many sets of keys are delivered with new cars, whether it is more than one; in other words, when you get them from Ford or wherever you get them from?

A. I believe it is two, but I don't know for sure.

Q. Where would the second set be? Do you know?

A. They were kept in our car control.

Q. Where is that?

A. At regional headquarters.

Q. What?

A. Regional headquarters.

Q. Where would that be, at the airport?

A. Back then I don't know where it was. That was before our building was built.

Q. Did the service agent ever take keys from you that had been returned to you, and put them in the cars

so that the service agents could pick them up — check-in agent, take the keys from you, put them in the cars so [15] that the cars could get picked up by the service agent?

A. Yes.

Q. Did they do that all the time? Was that his duty?

A. Yes.

Q. Would the time lapse between the time they were picked up and the keys put in them, depend upon the number of cars that were there at one time because of the number of the service agents?

A. Probably.

Q. Would the cars be left out there for thirty minutes?

A. I can't really say.

Q. Twenty minutes?

A. I suppose it is possible, yes.

Q. Did you ever see any cars stolen right out there in front of your own eyes?

A. No.

Q. Who was Don Damico back then in January of 1973?

A. He was the zone manager.

Q. Where is he now?

A. He does not work for Avis.

Q. I know that, but do you know where he is or who he works for?